

THE HONORABLE KAREN L. STROMBOM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEN ARONSON,

Plaintiff,

v.

DOG EAT DOG FILMS, INC.,

Defendant.

NO. 3:10-CV-05293-KLS

PLAINTIFF'S MOTION FOR
RECONSIDERATION OF ORDER
DENYING PLAINTIFF'S MOTION FOR
RECONSIDERATION

NOTE FOR MOTION CALENDAR:

OCTOBER 8, 2010

I. RELIEF REQUESTED

Plaintiff respectfully requests the Court reconsider and reverse the Order Denying Plaintiff's Motion for Reconsideration because the defendant has produced new evidence showing (1) it intentionally handcrafted overly broad, "sleeper legislation" in order to attack Plaintiff's claims with a new law, and (2) it obtained a continuance under false pretenses so it could file its attack immediately after its unconstitutional legislation became effective.

This new evidence justifies the Court reconsidering its decision to deny Plaintiff's motion for reconsideration, particularly given the genuine constitutional issues raised by that motion. If anyone was sandbagging these issues, it was the defendant, not Plaintiff.

II. BACKGROUND FACTS

The defendant became aware of this case on September 25, 2009, when its talent agent was served with a copy of the complaint and a letter suggesting an early mediation.¹

The complaint was filed on April 27, 2010,² and served on April 29, 2010.³ Although the defendant's answer was due within twenty days, its lead counsel requested an extension under the guise that "I will be getting married next week, and then going on a honeymoon to New Zealand, and will return to my office on June 7, 2010. Accordingly, I would appreciate an extension regarding the deadline or deadlines to file the Answer to Complaint and any Motion in response to the Complaint to June 9, 2010."⁴ Plaintiff stipulated to an extension based on that representation,⁵ and the Court granted the stipulated continuance.⁶

As it turns out, the representation was false, or was a calculated misrepresentation aimed at abusing the legislative and judicial process: as the defendant knew by drafting it, the Washington Anti-SLAPP Act ("the Act") was not effective until June 10, 2010.⁷

The defendant used its continuance to file its answer the day before its handcrafted legislation became effective, disclosing its Anti-SLAPP defense for the first time,⁸ and filed its motion to strike two days later, the day after its legislation became effective.⁹

¹ Declaration of Service, Vertetis Decl., Ex. 1.

² *See generally* Complaint, Dkt. #1 (filed on April 27, 2010).

³ Declaration of Service, Vertetis Decl., Ex. 2.

⁴ Letter from Johnson to Vertetis, dated May 18, 2010, Vertetis Decl., Ex. 3.

⁵ Vertetis Decl., at ¶ 4.

⁶ Stipulation and Order to Extend Defendant's Deadline to Answer the Complaint and/or Make Any Motion in Response to the Complaint, Dkt. # 12 (filed on May 25, 2010).

⁷ Final Bill Report, SSB 6395, Vertetis Decl., Ex. 4.

⁸ Answer and Affirmative and Other Defenses, Dkt. # 13 (filed June 9, 2010), at ¶ 6.11.

⁹ *See generally* Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and Invasion of Privacy, Dkt. #15 (filed on June 11, 2010).

1 The defendant's newly disclosed time entries, which Plaintiff could not have obtained
 2 until the defendant voluntarily disclosed them, reflect this was not coincidental timing.
 3 Instead, the defendant was furiously working to apply its legislation to this case when it
 4 represented that it needed a continuance because its lead counsel would be out of the
 5 country.¹⁰ This includes numerous entries prior to May 18, 2010, where the defendant
 6 strategized on how to apply its legislation,¹¹ and numerous entries between that date and June
 7 7, 2010, where its lead counsel, who was supposedly out-of-the-country and unable to work
 8 on this case, continued working on its special motion to strike.¹²

10 Plaintiff previously asked the Court to reconsider its decision to apply the Act to this
 11 case because the statute is unconstitutional for a number of reasons, including that the
 12 Washington constitution protects its citizens from "sleeper" legislation that violates Article II,
 13 Section 37, and overly broad legislation that violates Article II, Section 19.¹³ The Court
 14 declined to do so because it concluded Plaintiff failed to raise these issues in response to the
 15 defendant's motion and pointed to no new evidence that would justify reconsideration.¹⁴

17 **III. ISSUE PRESENTED**

18 Whether the Court should reconsider the Order Denying Plaintiff's Motion for
 19 Reconsideration, and hear Plaintiff's Motion for Reconsideration, when (1) the
 20 defendant has produced new evidence showing it handcrafted overly broad,
 21 sleeper legislation that violates the Washington constitution, and then obtained a
 22 continuance under false pretenses in order to use that unconstitutional legislation
 against Plaintiff, (2) this new evidence justifies the Court analyzing the

23 ¹⁰ Declaration of Bruce E.H. Johnson in Support of Defendant's Motion for Attorneys' Fees and Costs Under
 24 RCW 4.24.525, Dkt. #31 (filed on September 22, 2010), Exhibit E, at 39-52.

25 ¹¹ *Id.* at 39-43.

26 ¹² *Id.* at 43-52.

¹³ Plaintiff's Motion for Reconsideration, Dkt. #24 (filed September 9, 2010), at 4-6.

¹⁴ Order Denying Plaintiff's Motion for Reconsideration, Dkt. # 33 (filed September 28, 2010).

1 constitutionality of the Act in order to prevent a substantial injustice, and (3)
 2 equity favors the Court addressing the important constitutional issues raised by
 3 Plaintiff's Motion for Reconsideration, particularly given the defendant's intimate
 4 role in drafting that legislation and its disingenuous effort to make sure it could
 use it to attack Plaintiff's claims after it became effective?

5 IV. LEGAL ARGUMENT

6 The Court should reconsider the Order Denying Plaintiff's Motion for Reconsideration
 7 because (1) the defendant has produced new evidence showing it handcrafted overly broad,
 8 sleeper legislation that violates the Washington constitution, and then obtained a continuance
 9 under false pretenses in order to use that unconstitutional legislation against Plaintiff, (2) this
 10 new evidence justifies the Court analyzing the constitutionality of the Act in order to prevent
 11 a substantial injustice, as requested in Plaintiff's Motion for Reconsideration that was denied,
 12 and (3) equity favors the Court addressing the important constitutional issues raised by
 13 Plaintiff's Motion for Reconsideration, particularly given the defendant's intimate role in
 14 drafting that legislation and its disingenuous effort to make sure it could use it to attack
 15 Plaintiff's claims after it became effective. Fed. R. Civ. P. 7(h)(1); Fed. R. Civ. P. 59(e); Fed.
 16 R. Civ. P. 60(b)(2), (3), and (6).
 17

18 Plaintiff asked the Court to reverse the order applying the Act to this case because the
 19 Washington constitution protects its citizens from "sleeper" legislation that violates Article II,
 20 Section 37, and overly broad legislation that violates Article II, Section 19.¹⁵ The Court did
 21 not reach the substantive merits of that motion because it concluded Plaintiff failed to raise
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26 ¹⁵ Plaintiff's Motion for Reconsideration, Dkt. #24 (filed September 9, 2010), at 4-6.

1 these issues in response to the defendant's motion and pointed to no new evidence or law that
 2 would justify reconsideration.¹⁶

3
 4 The defendant's recently disclosed time entries, which Plaintiff could not have
 5 obtained until it voluntarily disclosed them, provide that new evidence and justify the Court
 6 reconsidering its decision. Respectfully, they show application of the Act was manifest error
 7 and resulted in an injustice that justifies relief, particularly where it was obtained through
 8 fraud. Fed. R. Civ. P. 59(e); Fed. R. Civ. P. 60(b)(2), (3), and (6). The defendant obtained a
 9 continuance under false pretenses so it could use its unconstitutionally overly broad, sleeper
 10 legislation to attack this case. Reconsideration is appropriate because these factual and legal
 11 reasons for Plaintiff's motion for reconsideration were not reasonably available until the
 12 Court issued its order and the defendant disclosed its time entries, including entries that show
 13 it obtained a continuance through fraud. The civil rules are to be construed to promote
 14 justice, not to endorse a party's abuse of the legislative and judicial process. Fed. R. Civ. P. 1.

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 16 Moreover, a party may raise jurisdictional issues at any time, and a court should
 17 consider constitutional issues when an "injustice might otherwise result" or when public
 18 policy requires review. *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199,
 19 1206 (1974); *see also Levinson v. Washington Horse Racing Com'n*, 48 Wn. App. 822, 828,
 20 740 P.2d 898 (1987) (a party may raise a constitutional issue as late as a motion for
 21 reconsideration from a Court of Appeals decision); RAP 2.5(a)(3) (a party may raise a
 22 "manifest error affecting a constitutional right" for the first time on appeal). Both the facts
 23 and the law justify the Court addressing the constitutional issues raised by Plaintiff's motion
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¹⁶ Order Denying Plaintiff's Motion for Reconsideration, Dkt. # 33 (filed September 28, 2010).

1 for reconsideration because an injustice will otherwise result and public policy weighs heavily
2 in favor of review, particularly given the defendant's now apparent role in drafting and then
3 using this unconstitutional legislation.
4

5 Given the Act took effect after Plaintiff filed suit, given the defendant's newly
6 disclosed time entries show it obtained a continuance through fraud in order to take advantage
7 of its overly broad, "sleeper" legislation, given the defendant's motion raised issues of first
8 impression, given the numerous unconstitutional issues raised by the Act and the order
9 applying it, given the injustice that will result if Plaintiff's claims were dismissed under an
10 unconstitutional statute, and given the injustice that will result if an unconstitutional statute is
11 used to impose a \$10,000+ penalty on Plaintiff, the Court would be acting well within its
12 discretion to address the constitutional issues raised in Plaintiff's Motion for Reconsideration.
13

14 If the defendant's misconduct and these constitutional issues are not addressed, the
15 defendant and other defendants will be encouraged to handcraft overly broad, "sleeper"
16 legislation targeted at the opposing party, use a misrepresentation to obtain a continuance
17 until their legislation becomes effective, and then ask to be rewarded, to the tune of \$57,000
18 in penalties, for their abuse of both the legislative and judicial systems. That is not the goal of
19 the civil rules, including CR 7(h)(1), Fed. R. Civ. P. 59(e) and, Fed. R. Civ. P. 60(b)(2), (3),
20 and (6).
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22 While reconsideration may only be appropriate under extraordinary circumstances,
23 those circumstances are present here. The integrity of the judicial process weighs strongly in
24 favor of reconsideration.
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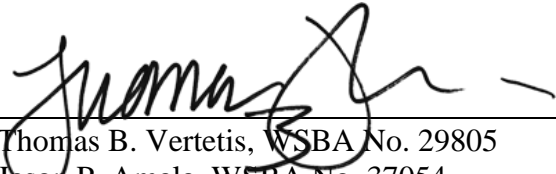
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V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court reconsider and reverse the Order Denying Plaintiff's Motion for Reconsideration.

Respectfully submitted this 8th day of October 2010.

By:


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THE HONORABLE KAREN L. STROMBOM

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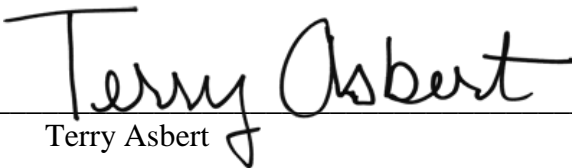
CERTIFICATE OF SERVICE

I, Terry Asbert, hereby certify that on today's date, I caused to be filed electronically (1) Plaintiff's Motion for Reconsideration of the Order Denying Plaintiff's Motion for Reconsideration, and (2) the Declaration of Thomas B. Vertetis in Support of Plaintiff's Motion for Reconsideration of the Order Denying Plaintiff's Motion for Reconsideration, with the court, using the CM/ECF system, which will send email notification of such filing to the below addresses, and I served a true and correct copy of the following documents by the method indicated below and addressed as follows:

 X CM/ECF Notification via email service to: Bruce E. H. Johnson, at brucejohnson@dwt.com and Noelle Kvasnosky, at noellekvasnosky@dwt.com.

1 I declare under penalty of perjury under the laws of the United States of America, 28
2 U.S.C. ¶ 1746, that the foregoing is true and correct.
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4 Dated this 8th day of October 2010 in Seattle, Washington.

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6 By  _____
7 Terry Asbert
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